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DURVET, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FARNAM COMPANIES, INC.,

Plaintiff,

V.

DURVET, INC.,

Defendant.

Case No. C 07 5367 CRB

DEFENDANT'S ANSWER AND
AFFIRMATIVE DEFENSES TO COMPLAINT
FOR DECLARATORY AND INJUNCTIVE
RELIEF AND DAMAGES

AND

DEMAND FOR JURY TRIAL

Honorable Charles R. Breyer
United States District Judge

Complaint Filed: October 19, 2007
Trial Date: TBD

Defendant, Durvet, Inc. (“Durvet”), for its answer to the Complaint of Farnam Companies, Inc. (“FCI” or “Plaintiff”), alleges as follows:

I.

PARTIES

1. Durvet is without information sufficient to form a belief as to the truth of the allegations contained in paragraph 1, and accordingly denies the same.

2. Durvet admits that it is a Missouri corporation with offices in Blue Springs, Missouri. Except as so expressly admitted, Durvet denies the allegations of paragraph 2.

III.

JURISDICTION AND VENUE

3. Durvet admits that the above-styled action is one for unfair competition and designation of false origin under the Lanham Act, for unfair competition arising under California common law, and for alleged violations of the California Business & Professional Code Section 17200, but specifically denies that Plaintiff is entitled to any of the relief sought herein.

4. Durvet admits that this Court has subject matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §§ 1331 and 1338. Accept as so expressly admitted, Durvet denies the remaining allegations of paragraph 4.

5. Durvet admits that it conducts business in the Northern District of California, but denies all remaining allegations of paragraph 5.

III.

FARNAM'S ALLEGED ADAMS TRADE DRESS

6. Durvet is without information sufficient to form a belief as to the truth of the allegations contained in paragraph 6, and accordingly denies the same.

7. Durvet denies that Plaintiff has acquired any enforceable trade dress rights as described in paragraph 7. However, as to the elements of trade dress claimed by Plaintiff, Durvet is without information sufficient to form a belief as to the truth of these allegations, and

1 accordingly denies the same. Except as so expressly admitted, Durvet denies the allegations of
2 paragraph 7.

3 8. Durvet is without information sufficient to form a belief as to the truth of the
4 allegations contained in paragraph 8, and accordingly denies the same.

5 9. Durvet is without information sufficient to form a belief as to the truth of the
6 allegations contained in paragraph 9, and accordingly denies the same.

7 10. Certain of the allegations contained in paragraph 10 are contentions of law, not
8 statements of facts, and, accordingly, no response is required to the same. However, Durvet
9 denies that any of its packaging could be "a colorable imitation" of or "confusingly similar" to
10 the alleged "Adams Trade Dress." Durvet is without information sufficient to form a belief as to
11 the remaining allegations contained in paragraph 10, and accordingly denies the same.

12 11. Durvet is without information sufficient to form a belief as to the truth of the
13 allegations contained in paragraph 11, and accordingly denies the same.

14 12. Durvet is without information sufficient to form a belief as to the truth of the
15 allegations contained in paragraph 12, and accordingly denies the same.

16 13. Denied.

17 14. Denied.

18 15. Denied.

DURVET'S ALLEGED INFRINGING ACTIVITY

19 16. Admitted.

20 17. To the extent that the allegations contained in paragraph 17 are contentions of
21 law, not statements of fact, no response is required to the same. To the extent that any of the
22 allegations in paragraph 17 could be considered statements of fact, said statements are denied.

23 18. Durvet admits that it has sold a flea and tick spray under the trademark NO-BITE
24 FLEA AND TICK MIST. Durvet denies the remaining allegations of paragraph 18.

25 19. Durvet admits that its NO-BITE FLEA AND TICK MIST branded product is
26 offered in a plastic bottle with a blue hue, with a trigger spray top. Durvet denies that Plaintiff is

1 entitled to any protectable rights in the so-called "Adams Trade Dress," and that any of the
 2 packaging utilized by Durvet for its NO-BITE FLEA AND TICK MIST branded product is
 3 "almost identical" to any of Plaintiff's packaging or claimed trade dress. Except as so expressly
 4 admitted, Durvet denies the allegations of paragraph 19.

5 20. Durvet admits that its NO-BITE FLEA AND TICK MIST branded product is sold
 6 through a variety of trade channels which include pet specialty stores. Except as so expressly
 7 admitted, Durvet denies the allegations of paragraph 20.

8 21. To the extent that the allegations of paragraph 21 are contentions of law, not
 9 statements of fact, no answer is required. To the extent the Court determines that any of the
 10 allegations of paragraph 20 are statements of fact, said allegations are denied.

11 22. Denied.

12 23. Denied.

13 24. Durvet denies the allegations in paragraph 24 including any allegation that
 14 Plaintiff has any protectable rights in its alleged "trade dress" or packaging.

15 **FIRST CLAIM FOR RELIEF**
 16 **(Trade Dress Infringement and Unfair Competition
 Under Section 43(a) of the Lanham Act)**

17 25. Durvet incorporates by reference its responses to the allegations contained in
 18 paragraphs 1 through 24 of Plaintiff's Complaint as if fully set forth herein.

19 26. Denied

20 27. Denied

21 28. Denied.

22 29. Denied.

23 **SECOND CLAIM FOR RELIEF**
 24 **(Unfair Competition Under the Common
 Law of The State of California)**

25 30. Durvet incorporates by reference its responses to the allegations contained in 1
 26 through 24 of Plaintiff's Complaint as if fully set forth herein.

27 31. Denied.

1 32. Denied.

2 33. Denied.

3 34. Denied.

4 **THIRD CLAIM FOR RELIEF**

5 **(Violation of California Business &
Professions Code Section 17200)**

6 35. Durvet incorporates by reference its responses to the allegations contained in
7 paragraphs 1 through 24 of Plaintiff's Complaint as if fully set forth herein.

8 36. Denied.

9 **AFFIRMATIVE DEFENSES APPLICATION TO ALL COUNTS**

10 **First Affirmative Defense:** As an affirmative defense, Durvet contends that Plaintiff has
11 failed to state a claim upon which relief may be granted.

12 **Second Affirmative Defense:** As an affirmative defense, Durvet states that Plaintiff's
13 claims herein are barred by estoppel, laches, acquiesces, and/or unclean hands.

14 **Third Affirmative Defense:** As an affirmative defense, Durvet states that Plaintiff is not
15 entitled to damages or other monetary relief with respect to the trade dress claims at issue for
16 activities that occurred prior to the time Plaintiff provided actual notice to Durvet as required by
17 the Lanham Act.

18 **Fourth Affirmative Defense:** As an affirmative defense, Durvet states that Plaintiff is
19 not entitled to damages or other monetary relief with respect to the "trade dress" claims at issue
20 for any activity due to the absence of proof of actual consumer confusion or willfulness.

21 **Fifth Affirmative Defense:** As an affirmative defense, Durvet states that the
22 designations, designs and/or practices used by Plaintiff and claimed to be its "trade dress" are
23 esthetic, functional, generic, descriptive, lack any acquired distinctiveness, are void of
24 "trademark" significance, and/or fail to function as an identifier of the source or origin of
25 Plaintiff's products and, therefore, cannot be protected under the Lanham Act or common law.

26 **Sixth Affirmative Defense:** As an affirmative defense, Durvet states that Plaintiff has
27 not acquired a "family" of trade dress for the packaging of its various products.

1 **Seventh Affirmative Defense:** As an affirmative defense, Durvet states that there is
 2 pervasive third-party use of the various packaging elements claimed by Plaintiff as its “trade
 3 dress” and, as such, Plaintiff cannot, as a matter of law, have any protectable interest in the
 4 putative trade dress elements or any combination, or part, thereof.

5 **Eighth Affirmative Defense:** As an affirmative defense, Durvet states that the
 6 designations, designs and/or business practices of Plaintiff claimed to be its “trade dress” are not
 7 inherently distinctive and have not acquired distinctiveness and, therefore, cannot be protectable
 8 under the Lanham Act or common law.

9 **Ninth Affirmative Defense:** As an affirmative defense, Durvet states that Plaintiff has
 10 no protectable right in and to the designations, designs and/or business practices claimed by
 11 Plaintiff to be its “trade dress.”

12 **Tenth Affirmative Defense:** As an affirmative defense, Durvet states that there is no
 13 likelihood of confusion between Plaintiff’s purported “trade dress” and Durvet’s packaging,
 14 particularly for its NO-BITE!-branded flea and tick mist product.

15 **Eleventh Affirmative Defense:** As an affirmative defense, Durvet states that there has
 16 been no actual confusion between Plaintiff’s purported “trade dress” and/or packaging with
 17 Durvet’s packaging and, thus, there has been no injury to consumers or to Plaintiff resulting from
 18 Durvet’s conduct.

19 **Twelfth Affirmative Defense:** As an affirmative defense, Durvet states that Plaintiff’s
 20 purported “trade dress” and/or the claimed elements thereof are functional and, therefore, cannot
 21 be protectable under the Lanham Act or common law.

22 **Thirteenth Affirmative Defense:** As an affirmative defense, Durvet states that
 23 Plaintiff’s purported “trade dress” and/or the claimed elements thereof are aesthetically
 24 functional and, therefore, cannot be protectable under the Lanham Act or common law.

25 **Fourteenth Affirmative Defense:** As an affirmative defense, Durvet states that
 26 Plaintiff’s purported “trade dress” and/or the claimed elements thereof are collectively and/or

1 independently merely decorative and, therefore, cannot be protectable under the Lanham Act or
 2 common law.

3 **Fifteenth Affirmative Defense:** As an affirmative defense, Durvet states that, to the
 4 extent that Plaintiff has any rights in and to its claimed “trade dress,” that Durvet’s use of
 5 packaging elements for its products, including the packaging for its NO-BITE!-branded flea and
 6 tick mist product, amounts to fair use.

7 **Sixteenth Affirmative Defense:** As an affirmative defense, Durvet states that the
 8 element making up Plaintiff’s claimed “trade dress,” either collectively or independently, amount
 9 to mere decoration and/or ornamentation, and as such do not act, individually or collectively, as
 10 source identification.

11 **Seventeenth Affirmative Defense:** As an affirmative defense, Durvet states that
 12 Plaintiff’s claims under California Business & Professionals Code Section 17200 is barred, in
 13 whole or in part, by laches, estoppel, equitable estoppel and/or the applicable statute of
 14 limitations in that Durvet has utilized blue packaging on its various veterinary products since as
 15 early as 1996.

16 WHEREFORE, Durvet, Inc. prays for the following relief:

- 17 (a) that the Court dismiss with prejudice the Complaint for Declaratory and
 18 Injunctive Relief and Damages of Plaintiff;
- 19 (b) that judgment be entered in favor of Durvet and against Plaintiff in this
 20 cause;
- 21 (c) that the Court declare that Plaintiff has no protectable interest in its alleged
 22 trade dress elements or any combination, or part, thereof;
- 23 (d) that the Court award Durvet its costs, expenses and attorneys’ fees
 24 incurred in the defense of this action; and
- 25 (e) for such other and further relief as the Court deems just and proper.

JURY DEMAND

Durvet, Inc. requests trial by jury of all claims so triable.

Dated this 12th day of December, 2007.

Respectfully submitted

/s/ Nathaniel Bruno

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